No. 80-894

In the Supreme Court of the United States

OCTOBER TERM, 1980

BECKER'S MOTOR TRANSPORTATION, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this bankruptcy tax case is whether the decision below correctly upheld the government's right to collect pre-petition penalties and post-petition interest that accrued prior to petitioners' payment of their tax debts.

1. The pertinent facts may be summarized as follows: Petitioners, Becker's Motor Transportation, Inc. and Needham's Motor Service, Inc., filed petitions for an arrangement under Chapter 11 of the Bankruptcy Act (11 U.S.C. 701 *et seq.*) on December 12, 1974 (Pet. App. 3a). The Internal Revenue Service thereafter filed proofs of claim against petitioners in the total amount of $74,792.04, representing nondischargeable tax debts and pre-petition interest. Petitioners proposed a plan of arrangement that

the bankruptcy court confirmed on December 1, 1976. Pursuant to the plan of arrangement, petitioners paid in full the priority tax claims of the Internal Revenue Service. In September 1977, after the arrangement estate was closed, the Internal Revenue Service sought to collect from petitioners $34,960.14 in pre-petition penalties and post-petition interest that had accrued prior to payment of the tax debts (Pet. App. 3a).

On May 18, 1978, the bankruptcy court reopened the arrangement proceeding, at petitioners' request, in order to permit them to file a complaint contesting the right of the Internal Revenue Service to collect the interest and penalties. Petitioners contended that the government was estopped from collecting such amounts because it had not given notice of its intention to do so during the arrangement proceeding. Petitioners alleged that the government's failure to give such notice misled them, their other creditors, and the bankruptcy court as to the total amount of the tax liabilities in issue (Pet. App. 4a). The bankruptcy court enjoined the government from further collection efforts, and the district court affirmed (*ibid.*).

The court of appeals reversed. It ruled that the government's claims were supported by the decisions of this Court. In the court of appeals' view, the government was not required to have advised petitioners, during the arrangement proceeding, of applicable judicial decisions holding that its claims to interest and penalties were not discharged (Pet. App. 14a-15a). Accordingly, the court of appeals concluded that the government was not estopped from collecting these amounts from petitioners after confirmation of their plan of arrangement.

2. Petitioners contend (Pet. 7-10) that the decision of the court of appeals in this case conflicts with an unreported decision of the Eighth Circuit in *In re Aristo Foods, Inc.*, Nos. 77-1931 and 78-1216 (Sept. 1, 1978) (Pet. App. 36a-

38a). In *Aristo Foods*, the court summarily concluded that the government had "accepted the amounts paid [in the arrangement proceeding] in satisfaction of the total debt" (Pet. App. 38a). Petitioners urge (Pet. 8-9) that *Aristo Foods* stands for the proposition that once the government obtains payment of its priority tax claims in an arrangement proceeding, it is estopped from assessing the rehabilitated debtor for unpaid penalties and interest after confirmation of its plan of arrangement.

But such a broad rule is squarely at odds with a well-established line of decisions of this Court. See *Bruning* v. *United States*, 376 U.S. 358, 363 (1964); *Hugh H. Eby Co.* v. *United States*, 456 F. 2d 923 (3d Cir. 1972); *In re Johnson Electrical Corp.*, 442 F. 2d 281 (2d Cir. 1971); *In re Jaylaw Drug, Inc.*, 621 F. 2d 524 (2d Cir. 1980). See also *Nicholas* v. *United States*, 384 U.S. 678 (1966). Given the summary statement of the Eighth Circuit in its unpublished opinion in *Aristo Foods*, that the government "accepted the amount paid * * *," that decision necessarily turns on the factual determination that the responsible government officials intended to accept payment of a particular amount under the arrangement plan. To be sure, the government may, as in *Aristo Foods*, affirmatively waive its claims for nondischargeable taxes subsequent to the confirmation of an arrangement plan. But the decision below properly rejected petitioners' contention that the silence of the government's proof of claim on this score amounted to a waiver of the government's right to future collection of such amounts.

At all events, the question of equitable estoppel raised by petitioners has little continuing significance under the new Bankruptcy Code. In cases under Chapter 11 of the new Code (11 U.S.C. (Supp. III) 1101 *et seq.*) involving a corporate debtor, the government must assert its tax claims, including pre-petition penalties, in the reorganization proceeding or they will be discharged when the debtor's plan is

confirmed. Post-petition interest is not allowable, and unless otherwise provided in the plan of arrangement, it will be discharged to the extent that it accrues prior to confirmation (11 U.S.C. (Supp. III) 1141(d)(1)(A)). Thus, under the new Code, only an individual debtor may arguably rely upon the government's proof of claim as a complete statement of all allowable tax claims. Since the reorganization provisions of Chapter 11 are primarily aimed at corporate reorganizations, instances of detrimental reliance on the government's proofs of claim in reorganization proceedings will be infrequent.

Petitioners also claim (Pet. 10-11) that the decision below conflicts with the decision in *Bostwick* v. *United States*, 521 F. 2d 741 (8th Cir. 1975), which held that despite the bar of the Anti-Injunction Act or the tax exception to the Declaratory Judgment Act, a bankruptcy court had jurisdiction under the old Bankruptcy Code to determine the dischargeability of a federal tax debt even though the United States had not filed a proof of claim or otherwise participated in the proceeding. But petitioners are hardly in a position to complain as to this portion of the decision below since it was not adverse to them. Although the court of appeals rejected this aspect of *Bostwick* (Pet. App. 7a-8a), it also found that the bankruptcy court had jurisdiction to grant the relief requested here in the form of a declaratory judgment. In the court of appeals' view, the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201) was not applicable to bankruptcy courts. This aspect of the court of appeals' decision was therefore in accord with *Bostwick* (521 F. 2d at 747).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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